J. T. Cullen Co. *and* **Robert C. Pollitz.** Case 33–CA–5999

6 July 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 17 January 1983 Administrative Law Judge Martin J. Linsky issued the attached decision. The Respondent has filed exceptions and a supporting brief, and the General Counsel filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, to modify the remedy,[2] and to adopt the recommended Order as modified.

The principal issue in this case is whether employee Robert C. Pollitz was engaged in concerted activity within the definition of *Meyers Industries*, 268 NLRB 493 (1984), when he refused to perform certain work which he considered to be unsafe. The judge, relying, inter alia, on *Alleluia Cushion Co.*, 221 NLRB 999 (1975), found that Pollitz' activity was concerted. In *Meyers*, however, the Board overruled the per se standard of concerted activity in *Alleluia Cushion* when it decided that in order for an employee's activity to be "concerted" it must be "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." Applying this definition to the instant case, we find for the reasons set out below that Pollitz' refusal to work constituted concerted activity.

The relevant facts are as follows: The Respondent is engaged in the business of industrial testing as well as the custom manufacture of metal parts. In 1981 American Xyrofin requested that the Respondent inspect a 135-foot-high smokestack. Pollitz, an inspector, was asked to investigate the jobsite before the Respondent submitted its bid. After Pollitz reported his findings, Senior Inspector Rex Winget prepared a cost estimate for the job in March 1982.[3] Winget decided that the job would be performed by one man working in a man cage which would be lifted into the air by a crane.

After the Respondent agreed to perform the inspection, Pollitz frequently discussed the safety aspects of that work with fellow inspectors Mark Herrmann and Bob Fowler. The three inspectors thought that the job, as Winget had designed it, was unsafe in that they were expected to work at a high altitude and possibly in windy conditions without any safety belts or tag lines. They also questioned the structural integrity of the man cage that the Respondent planned to use. On at least three occasions in late March, inspectors Pollitz, Fowler, and Herrmann together advised Winget—their immediate supervisor—of their safety concerns. During one of these group discussions, Pollitz told Winget, "[I]f [the job] was set up safe, we would do the job, but . . . until we were sure the job was safe we would not perform the job."

On 7 April Winget asked Fowler if he would do the job and Fowler told him he was not willing to do it. Pollitz also told Winget that he was not willing to do the job as designed. Winget then informed Frank Johnson, the Respondent's president, that the inspectors believed that the job was unsafe, and that neither Fowler nor Pollitz was willing to do the job.

On 12 April, Frank Johnson asked Pollitz why he did not want to perform the smokestack inspection. Pollitz replied that based on his discussions with Winget and the Respondent's plant manager Roger Johnson Pollitz considered the job to be unsafe. In response, Frank Johnson threatened Pollitz with discharge if he did not perform the work. When Pollitz refused, Frank Johnson discharged him that day.

The record supports a finding that Pollitz engaged in concerted activity as defined by *Meyers*. The three inspectors discussed their safety concerns among themselves and with Winget, and then *jointly* put Winget on notice that they would not perform the smokestack inspection unless they were sure it was safe. Winget then informed the Respondent's president Frank Johnson that Pollitz and Fowler would not perform the job unless it was safe. Thereafter, on 12 April, in response to Frank Johnson's question as to why Pollitz would not perform the inspection, Pollitz reiterated that based on his discussions with Winget and Roger Johnson he considered the job unsafe. Frank Johnson thereupon threatened Pollitz with discharge,

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Because the judge inadvertently failed to provide for such a requirement, we hereby modify the remedy to require that the Respondent expunge from its files any reference to the discharge of Robert C. Pollitz on 12 April 1982, and notify Pollitz in writing that this has been done and that evidence of this unlawful discharge will not be used for future personnel actions against him. In addition, we shall modify the recommended Order accordingly. See *Sterling Sugars*, 261 NLRB 472 (1982).

[3] All dates are 1982 unless otherwise indicated.

and later did discharge him because Pollitz declined to perform the work. We find that Pollitz' refusal leading to his discharge was based on the mutual employee decision jointly communicated to Supervisor Winget and therefore constituted concerted activity. We further find that the Respondent knew of Pollitz' concerted activity, that the activity was protected,[4] and, for the reasons discussed by the judge, that the discharge was motivated by that activity. We therefore conclude that Pollitz' discharge violated Section 8(a)(1) of the Act. Accordingly, we shall adopt the judge's recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, J. T. Cullen Co., Fulton, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs.

"(c) Expunge from its files any reference to the discharge of Robert C. Pollitz and notify him in writing that this has been done and that evidence of his unlawful discharge will not be used as a basis for future personnel actions against him."

2. Substitute the attached notice for that of the administrative law judge.

[4] We agree with the judge's finding that Pollitz honestly and reasonably believed the work was unsafe, and thus we find that his refusal to work was protected by the Act. In so finding, we note that our adoption of the judge's reliance on *Tamara Foods*, 258 NLRB 1307 (1981), is limited to this sole proposition. We find it unnecessary to pass on any other aspect of the Board's decision in that case.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT interfere with these rights given to you by law.

WE WILL NOT discharge or otherwise discriminate against employees because they engage in protected concerted activity such as a refusal to perform work that the employees in good faith believe to be dangerous to their life or health.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Robert C. Pollitz immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL expunge from our files any reference to the discharge of Robert C. Pollitz and notify him in writing that this has been done and that evidence of his unlawful discharge will not be used as a basis for future personnel actions against him.

J. T. CULLEN CO.

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. Upon a charge filed on May 17, 1982, by Robert C. Pollitz, an individual, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 33, issued a complaint, dated July 1, 1982, which alleges that J. T. Cullen Co., herein Respondent, violated Section 8(a)(1) of the National Labor Relations Act herein the Act, by discharging Robert C. Pollitz on April 12, 1982, for engaging in protected concerted activity, namely, refusing to perform a job he and his fellow employees deemed in good faith and reasonably believed to be unsafe. Respondent denied in its answer and at the hearing that it violated the Act in any way. Rather, Respondent contends that it discharged Pollitz because of insubordination. A hearing was held in this case in Rock Island, Illinois, on October 5, 1982.

On the entire record in this case, including posthearing briefs filed by the General Counsel and Respondent, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

J. T. Cullen Co. is, and has been at all times material herein, an Illinois corporation with an office and place of

business located at Fulton, Illinois. It is engaged in the business of industrial inspection and testing.

Respondent, during the past 12 months, which period is representative of all times material herein, performed services valued in excess of $50,000 for customers located outside the State of Illinois.

Respondent, during the past 12 months, which period is representative of all times material herein, in the course and conduct of its business operations, purchased and caused to be transferred and delivered to its Illinois jobsites goods and materials valued in excess of $50,000, which goods and materials were transported to said jobsites directly from States other than the State of Illinois.

Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

On April 12, 1982, Respondent discharged Robert C. Pollitz because he refused to do a job assignment, i.e., perform an inspection of a smokestack to gauge its thickness in order to establish a benchmark for corrosion and deterioration up to a height of about 120 feet. The inspection was to be performed using a man cage hoisted by a large, rented crane. It is the contention of the General Counsel that Pollitz' discharge for refusing to do this job was in violation of the Act because Pollitz was engagaing in protected concerted activity in refusing to perform the assignment. Respondent contends that Pollitz was legitimately discharged for insubordination. I agree with the General Counsel.

J. T. Cullen Co. is in the business of steel fabrication from plans and specifications drawn by them or provided by customers. It also does repair work both in its plant and in the field. Its plant employees are represented by the Boilermakers Union. Some years ago Respondent set up a division called Industrial Inspection and Testing Service (ITTS), which is not unionized and which does ultrasonic and radiographic nondestructive testing of such things as welds and metals. At the times material in this case four inspectors worked in the testing section: Rex Winget, Robert C. Pollitz, Mark Herrmann, and Robert Fowler. The senior inspector was Rex Winget, who, I find, was a supervisor within the meaning of Section 2(11) of the Act since he had his office separate from the other three inspectors, worked 1 hour a day longer than the other inspectors, assigned work to the other inspectors on the basis of the difficulty of the job and the experience and competence of the other inspectors, interviewed job applicants and made recommendations regarding hiring to his supervisors, initiated corrective action if someone in his department was not doing a good job, and maintained the personnel files on the other three inspectors.[1] In addition, Winget is described in Respondent's brief as the "immediate supervisor" of Robert Pollitz. Winget reported to Frank Johnson, president of Respondent, and his son, Roger Johnson, Respondent's plant manager and secretary-treasurer.

In 1981 a company named American Xyrofin contacted Respondent to inquire if Respondent could perform an inspection of American Xyrofin's 135-foot-high smokestack. Robert Pollitz was asked to inspect the jobsite prior to Respondent making a bid since Pollitz was scheduled to be in the area anyway. Specifically, Pollitz was to ascertain if a painter's trolly was still in place. Pollitz reported back to Respondent that the painter's trolly had been removed.

Thereafter, in March 1982, American Xyrofin contacted Respondent again and spoke with Rex Winget regarding the inspection of its smokestack Winget wrote up a cost estimate on the job on the basis that it would be done by one man working in a man cage and that man cage would be lifted into the air by a crane.

The American Xyrofin job order was brought into the office of the three inspectors, i.e., Robert Pollitz, Mark Herrmann, and Bob Fowler, all of whom discussed this particular job often and at length. In fact after Pollitz had inspected the jobsite but before the job was even written up Pollitz had discussed this inspection job with his coworkers and a consensus was reached that the job was unsafe. After the job order came in their office the three inspectors continued to discuss the safety aspects of this inspection. I credit the testimony of Pollitz, Herrmann, and Fowler, and, therefore, find that on numerous occasions between March 22, 1982 (when the job was bid), and April 1, 1982 (when the inspection was first scheduled to be done), that these three employees discussed the inspection job with each other and concluded that it was unsafe to do this inspection for a variety of reasons, e.g., the high altitdue and windy conditions, the actual structure of the man cage itself (pictures of which are in the record), the lack of safety belts, and the need for tag lines to secure the cages. Further, I find that Pollitz, Herrmann, and Fowler discussed this inspection job with Rex Winget, a supervisor, on at least three occasions between March 22 and April 1, 1982. The three employees expressed to Winget their grave reservations about doing this job because of safety concerns. I also find that the three inspectors's safety concerns were concerns expressed to Winget in good faith. In addition, Pollitz expressed to Roger Johnson the concern of himself and the other inspectors that this job as proposed to be done by Winget was unsafe.

The inspection, which had initially been scheduled for April 1, 1982, was postponed due to windy weather conditions. On April 12, 1982, the inspection was rescheduled and Pollitz was directed to conduct the inspection. Between April 1 and 12, Pollitz had continued to discuss this inspection with his coworkers, Fowler and Herrmann, and all three of these employees continued in their good-faith belief that this job was unsafe.

On April 12, 1982, Frank Johnson, president of Respondent, asked Pollitz why he did not want to perform this inspection. As regards the particulars of this conversation and what else transpired between Frank Johnson and Pollitz on April 12, I specifically credit Pollitz' testimony and not that of Frank Johnson. Basically, Pollitz told Frank Johnson that he considered the job to be

[1] *Custom Bronze & Aluminum Corp.*, 197 NLRB 397 (1972).

unsafe if done the way he understood it was to be done.[2] The bottom line is that Pollitz clearly expressed to Frank Johnson that Pollitz thought the job to be unsafe. An opinion he and his fellow employees had made known to two other supervisory officials, Rex Winget and Roger Johnson. He was told by Frank Johnson, however, that he would be discharged if he did not do it. Pollitz left Frank Johnson's office. Pollitz wanted to talk with his wife about what to do. He was unable to reach her. He concluded in his own mind that the job as set up was unsafe. He went back to Frank Johnson, told him he was not going to do the inspection, and was discharged. In refusing to perform this task which he and his coworkers thought in good faith was unsafe Pollitz was engaging in protected concerted activity under the Act. *E. R. Carpenter Co.*, 252 NLRB 18 (1980).

Later that day, Rex Winget went to American Xyrofin and did the inspection. He did it without a safety belt. He brought along Mark Herrmann as an assistant. After going part way up in the man cage Winget ordered the man cage to the ground and directed Herrmann to secure lines which could be used as tag lines. Thereafter, the inspection job was accomplished with Herrmann and another person holding two separate tag lines from the ground to steady the man cage.

The fact that Rex Winget was able to do the job that Pollitz refused to do for safety reasons does not mean that Pollitz' refusal was not reasonable and made in good faith. It may simply mean that Winget is braver or more foolhearty than Pollitz.

The facts clearly demonstrate that Pollitz and two other employees, Herrmann and Fowler, engaged in protected concerted activity in discussing among themselves their objections to do this inspection and in bringing their mutual concern to the attention of management in the person of Rex Winget. *Alleluia Cushion Co.*, 221 NLRB 999 (1975). Further, Pollitz engaged in protected concerted activity in bringing the safety concerns of himself and his fellow employees to the attention of both Roger and Frank Johnson. I find that Pollitz and the other two employees acted in good faith in expressing their safety concerns to management.

Respondent contends that the refusal of Pollitz to do the inspection was not prompted out of fear for his safety but rather he refused to do the inspection in order to undercut the authority of Rex Winget and thereby make Winget look bad in the eyes of Respondent's top management. There is simply no basis in the record to support this conclusion. The three employees reasonably and in good faith were concerned about safety on this inspection assignment. During the actual inspection on April 12 Winget asked Herrmann, who was assisting him from the ground, if he would go up in the man cage and Herrmann replied, "[N]o way." Further, if Pollitz was not afraid for his safety in doing this job he would not have refused to do it. He had plenty of opportunity to change his mind and do the job after Frank Johnson had told him he would be discharged if he refused.

Two other factors should be noted as well. This inspection job was a most unusual job for Respondent and it was not a big lucrative job. According to Winget, who had been with Respondent for 12 years prior to the hearing, this was only the second time (the other being 3 years before) that an inspection was done at this height, and according to Frank Johnson this inspection was a "very little job." Respondent cannot and does not take the position that its very economic existence depended on its employees doing this job and jobs similar to it in all respects.

If employees engage in protected concerted activity by expressing to management their concerns about the safety of a job and one or more in good faith refuse to do that job or remain at a jobsite, they collectively deem to be unsafe and one or more employees are discharged for that then the discharges are in violation of Section 8(a)(1) of the Act. *Union Boiler Co.*, 213 NLRB 818 (1974); *Tamara Foods*, 258 NLRB 1307 (1981). The appropriate remedy for such a violation is an order to cease and desist, reinstatement with backpay of the discharged employees, and the posting of an appropriate notice.

Conclusions of Law

1. The Respondent, J. T. Cullen Co., is an employer enagaged in commerce, and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By discharging Robert C. Pollitz for engaging in protected concerted activity under Section 7 of the Act, Respondent has engaged in an unfair labor practice in violation of Section 8(a)(1) of the Act.

3. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, J. T. Cullen Co., Fulton, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because they engage in protected concerted activity such as a refusal to perform work that the employee in good faith believes to be dangerous to his life or health.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

[2] The thrust of the objection to doing the inspection was a combination of the structure of the man cage and the extreme height to which the inspector in the man cage would be lifted. Although Pollitz and the other inspectors felt safety belts and tag lines would be needed they were never specifically told they could not have safety belts or tag lines but in fact safety belts were not offered by management nor did management make clear to Pollitz that he could take one or more persons with him to the job if needed to secure tag lines to the ground.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to Robert C. Pollitz full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges.

(b) Make Robert C. Pollitz whole for any loss of pay he may have suffered by reason of Respondent's discrimination against him by payment to him of a sum of money equal to that which he normally would have earned as wages from April 12, 1982, less net earnings, with backpay to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its place of business copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 33, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[4] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."